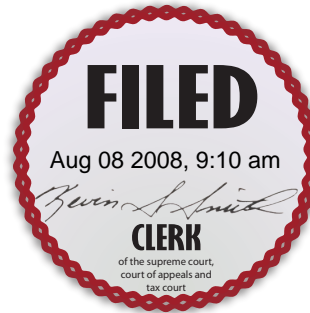


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**DAVID W. STONE IV**  
Anderson, Indiana

ATTORNEY FOR APPELLEE:

**JOSEPH J. BERGACS**  
New Castle, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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LEWAYNE HILBERT,  
Appellant-Respondent,

vs.

DEBORAH S. HILBERT,  
Appellee-Petitioner.

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No. 33A05-0804-CV-210

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APPEAL FROM THE HENRY SUPERIOR COURT  
The Honorable Michael D. Peyton, Judge  
Cause No. 33D01-0606-DR-95

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**August 8, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

LeWayne Hilbert (“Husband”) appeals from the dissolution court’s final decree dissolving his marriage to Deborah Hilbert (“Wife”). He presents the following issues for our review:

1. Whether the dissolution court excluded Wife’s interest in a trust from the marital estate.
2. Whether the dissolution court abused its discretion when it divided the marital estate.
3. Whether the dissolution court abused its discretion when it concluded that Husband is voluntarily underemployed.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

Husband and Wife were married in 1971 and separated in 2006. The parties have four children together, only one of whom is currently a minor. Husband and Wife made their living as farmers for several years and ran a corporation known as Hilbert Farms. The corporation owned property called Bluegrass Farms, and Wife owned property called Dennis Farm, which had been in her family for generations. The proceeds from crops from both farm properties went through Hilbert Farms, and loans for farming expenses were obtained through the corporation. Husband did approximately 80% of the physical labor on the farms, and Wife did approximately 20% of the physical labor, until she gave birth to the parties’ youngest child in 1992. Thereafter, Wife continued to do the bookkeeping for the farming operations.

Wife inherited Dennis Farm after her father died in 1991, and Wife is a beneficiary of a trust Wife’s mother created after she died. Wife can only receive the

trust corpus if Husband predeceases her and if she requests that the trust terminate. The trust corpus is currently worth approximately \$500,000. The trustee can invade the trust corpus for the benefit of Wife and two of the parties' children, to provide for their support, maintenance, health, and education. In 2006, Wife received income distributions from the trust in the amount of \$20,154. In addition, Wife inherited a Putnam Account from her mother, and that account has always been in Wife's name only.

Husband has a commercial driver's license ("CDL"). Beginning in 2001, Husband worked for Switzer Tank Line as a fuel truck driver, but he quit that job in April 2007. Thereafter, Husband started his own lawn and pool care business. Wife works part-time in the cafeteria at her daughter's school during the school year.

Wife filed a petition for dissolution of her marriage to Husband in June 2006. Following a hearing, the dissolution court entered the following relevant findings and conclusions:

[FINDINGS:]

12. That Wife received the Dennis Farm as an inheritance from her father. The Dennis Farm is a farm located in Wayne County and contains 287.5+/- acres and appraised for \$661,250.00 by appraiser Dan Semler around March 8, 2006. This figure appears to be acceptable to both parties as they have both used the figure for their proposed findings.

13. The Dennis Farm is titled in Wife's name only and always has been since it was deeded to her from her father's estate.

14. Wife made the major decisions regarding the Dennis Farm in that she never allowed it to be mortgaged or put up as collateral for any farming or other need, while other farming property of the parties was encumbered. Wife also receives government program checks for the Dennis Farm in her own name.

15. Wife and Husband both participated in the farming of the Dennis Farm while Bud Dennis was alive and Husband farmed it the year of Bud Dennis' death.

16. That prior to Bud Dennis' death there was an arrangement between Bud Dennis and Husband to farm the Dennis Farm on the halves. Bud Dennis provided the land, paid the taxes and building maintenance and Husband provided the labor and machinery. This occurred from 1971 until Bud's death in 1991. But Dennis also provided additional money and equipment to the farm over the years that Wife and Husband farmed the property. During the time that the Dennis Farm was farmed on the halves, only Bud Dennis owned and had title to that farm.

17. There was no partnership agreement entered into between Bud Dennis and the parties to this action and Husband did not file a claim against the estate of Bud Dennis.

18. Husband claimed that he brought \$60,000.00 into the marriage and that the farming operations were successful and making \$250,000.00 per year when Bud Dennis died. The Court does not find this testimony to be credible in light of the testimony regarding the amount of assistance provided by Bud Dennis and the general financial difficulties of the parties at that time. Bud Dennis helped Wife and Husband by providing machinery and financial help especially the years closer to his death. Bud Dennis cosigned a loan for Wife and Husband in excess of \$200,000.00, which was settled and paid by Bud Dennis' estate. Further the parties . . . in 1990 received a discharge of indebtedness in the amount of \$86,840.70 from the US Department of Agriculture all to keep the farming operation afloat. The financial sheet from November 15, 1990 shows a negative net worth for the parties' farming operation while the financial statement from December 1, 1992, after Wife had received her inheritance from her dad, [shows] a positive net worth for the farming operation reflecting Wife's use of inheritance money to pay down the debt. The "partnership" which Husband claims to have existed appears nothing more than a "crop share" arrangement in which one party (Bud Dennis) provided the land, buildings and paid the taxes on the same while Husband and Wife provided the equipment and labor. The profits were shared. At the end of the arrangement each side walked away with their own assets and disposed of them as they desired.

19. The parties owned Blue Grass Farm located in Wayne County, which contained 299+/- acres. That property was held in the name of Hilbert Farms, Inc. . . .

\* \* \*

29. Husband's gross income for 2006 was \$44,506.34. Pursuant to the Provisional Order dated August 9, 2006 Husband's weekly gross income was \$810.00.

30. Husband's gross income for 2007, up to the time he quit his job was \$14,942.87. Husband's last pay date was May 4, 2007. Pro-rating that income results in Husband's weekly gross income at \$830.16.

31. Husband admitted that he was very knowledgeable in the trucking industry and that because he has a CDL license and the ability to drive semi trucks, that his earning potential was substantial.

32. When considering all of the testimony, the Court does not place a very high level of credibility upon Husband's claim that he quit his job [at Switzer] for health reasons.

\* \* \*

34. Wife attended one semester at Purdue University. She then returned home and married Husband at the age of 18. Shortly thereafter they had their first child at Wife's age of 19. Wife worked in the home most of her married life raising the children in addition to working in the fields during a portion of their marriage and being the principal bookkeeper on the farming operation. After 1991 Husband no longer farmed and therefore, Wife did not work in the fields. Wife's earning potential appears to be substantially less than Husband's.

35. Wife started working in January 2003 as a part time secretary at her church making \$7.00 an hour. Wife stopped working at the church before her surgery [hysterectomy] in April 2006.

36. Wife is 55 years old and is now living in Fishers, Indiana. She looked for a job after the parties separated and found it hard to find employment. Wife now works at Fishers High School in the cafeteria working part time, which is the same school attended by [the parties' daughter].

37. Wife is employed for 180 days while school is open, makes \$10.42 per hour and works 30 hours per week. Her weekly gross income is \$216.41. (That amount is arrived at as follows: \$10.42 multiplied by 30 hours equals \$312.60, however Wife's employment is only 36 weeks because she works in a school and is off when the children are not present. So \$312.60 multiplied by 36 weeks, the actual number of weeks Wife will work this

year, which is \$11,253.60 and then divided that by 52 to come up with a weekly gross income of \$216.41 from her employment.)

38. Wife also receives income from a trust set up by her mother, Anna Louise Hall. Wife received \$20,154.00 from the trust in 2006. That amount divided by 52 weeks gives Wife a weekly gross income from the trust of \$387.58. Wife did not draw anything from the trust for the first few years. Wife's total weekly gross income from the trust and employment is \$603.99.

39. The Court would note at this point that neither party presented tax returns as evidence for the years 2005 or 2006. Without this information the Court is unable to determine the amount of income from the Dennis Farm, how the parties treated it for tax purposes and how much to attribute to each of the parties in the child support calculation from that asset.

40. That Wife's mother established a trust to benefit the Wife and evidence was submitted . . . . The parties appear to agree that the trust corpus contains approximately \$500,000.00. Wife's mother died March 3, 2001.

41. Pursuant to said Trust, Citizens State Bank is the trustee, and during the lifetime of Wife, the trustee shall, subject to the request of Wife, either verbally or in writing, pay Wife the net income generated on her share of the trust corpus. Further the Trust states, "In addition, thereto, the Trustee may distribute to or expend for my daughter and her two children [S.H. and H.H.] such part of the trust corpus as the Trustee deems appropriate to provide for the support, maintenance, health, and education of my daughter and said two children." The Trust also states that "In addition to the foregoing, this trust shall terminate following the death of my son in law, Lewayne Hilbert, provided my daughter, Deborah S. Hilbert files a written statement in writing to the Trustee requesting such termination."

42. That on August 9, 2006, this Court entered a Provisional Order . . . where the Court ordered Husband to pay child support to Wife in the amount of \$95.00 per week for the parties' minor daughter, [H.H.].

\* \* \*

44. Husband has not filed a Petition to Modify Child Support. Husband has failed to pay child support in the amount as ordered and unilaterally changed the amount of child support to \$70.00 and had done so for 5 weeks before the hearing in this matter resulting in an arrearage at the time of the hearing of \$125.00. Based upon the testimony of Husband that he

unilaterally decided to change the support without authority, the Court finds that to be contempt.

\* \* \*

[CONCLUSIONS:]

5. Pursuant to Petitioner's Exhibit 16, Husband should pay support in the amount of \$85.00 per week . . . . Imputing income is appropriate to Husband because he is voluntarily underemployed. . . .

6. The marital assets consist of the following: [marital residence \$205,000; escrow account proceeds from Blue Grass sale \$211,099; house and 1½-acre tract from Blue Grass \$27,000; Dennis Farm \$661,250; Putnam account \$9033.20; Wife's life insurance \$20,674.99; Husband's life insurance \$26,883; Husband's Edward Jones IRA \$29,284; Husband's retirement account at Switzer \$1737.94; Husband's Farm Bureau annuity \$11,144; jointly owned mutual fund annuity at Edward Jones \$10,900; TOTAL \$1,214,006]. The marital assets also include those items of unvalued personal property that are in either party's possession, including, but not limited to, the piano, a sewing machine, a rocking chair, a filing cabinet, the limestone bird bath, the pool furniture at the marital residence, Wife's Honda vehicle, Husband's Dodge pickup, an Allis Chalmers WD45 tractor, an electric welder, and a log splitter.

7. The marital assets include the trust corpus from the First Amendment to Revocable Trust Agreement of Anna Louise Hall. Neither party presented evidence to the Court regarding the present value of such interest. The only value attributed to the trust was a loose estimation of the overall value of the assets held in the trust. Wife contends that she does not have a present vested interest in the trust corpus and that her interest is only contingent in that she only receives that corpus, or whatever is left of it, if Husband dies before Wife, and further does subject to her first requesting it. The interest in the trust is clearly a part of an overall plan on the part of Wife's family to distribute assets to the Wife without benefiting Husband. There is no credible evidence before the Court to show that the trust assets were developed or enhanced by the efforts of Husband during the course of the marriage. This asset should go to the Wife without any apportionment to Husband in the division of property.

\* \* \*

9. In this case [the statutory factors] indicate that an equal division of the property would not be just and reasonable. All of the relevant factors

contained in IC 31-15-7-4 and IC 31-15-7-5 have been considered in making a determination in distributing the marital assets to the parties.

10. The Court concludes that Wife should have as her portion of the marital estate: [\$107,299.50 out of the Blue Grass escrow account; \$13,500 out of the value of Blue Grass house and 1½-acre tract; \$661,250—Dennis Farm; \$9,033.20—Putnam account; \$20,674.99—her life insurance; \$5,450—one-half of jointly-owned Edward Jones mutual fund annuity; undetermined present value of Wife’s interest in mother’s trust; one-half of net proceeds from sale of marital residence if sale closed within six months from date of decree, otherwise \$95,000 from proceeds of the sale.] Wife shall also receive the personal property items that are in her possession plus the piano, a sewing machine, a rocking chair and a filing cabinet. She shall retain her Honda vehicle. . . .

11. Husband shall receive from the marital assets the following: [the right to determine the selling price for the sale of the marital residence and the balance of the proceeds after payment to Wife of the amounts determined due her; one-half the value of the escrow account after deduction of \$3500 for Wife’s medical expenses; \$13,500—one-half the value of the Blue Grass house and tract; \$26,883—his life insurance; \$1,737.94—Switzer retirement account; \$11,144—Farm Bureau annuity; \$5,450—one-half of jointly-owned Edward Jones mutual fund annuity; and \$29,284—Edward Jones IRA]. Husband shall also receive the personal property items that are in his possession, with the exception of those items that Wife or the children may take. Husband shall have his Dodge pickup, an Allis Chalmers WD45 tractor, an electric welder, and a log splitter.

12. That an unequal distribution of the marital assets is appropriate in this case. Wife has rebutted the presumption of a just and equal split. The unequal distribution is appropriate because of the property that was acquired by Wife through the inheritance from her father and mother. The Court has concluded, based upon previous findings, that Husband’s efforts in relation to the Dennis Farm were compensated by sharing the income from that farm and the subsequent sale of any equipment that had been used in connection with that farm. There is no credible evidence to show that Husband contributed in any fashion to the assets contained in the Louise Hall Trust. Further, an unequal distribution is appropriate because the earning potential for Husband is superior to the earning potential of Wife.

Appellant’s App. at 9-22 (emphases added). This appeal ensued.



## **DISCUSSION AND DECISION**

### **Standard of Review**

In this case, the dissolution court entered findings of fact and conclusions on its own motion. When the dissolution court enters such findings *sua sponte*, the specific findings control only as to the issues they cover, while a general judgment standard applies to any issue upon which the court has not found. Apter v. Ross, 781 N.E.2d 744, 751 (Ind. Ct. App. 2003), trans. denied. The specific findings will not be set aside unless they are clearly erroneous, and we will affirm the general judgment on any legal theory supported by the evidence. Id. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. Id. In reviewing the dissolution court's findings, we neither reweigh the evidence nor judge the credibility of the witnesses. Id. Rather, we consider only the evidence and reasonable inferences drawn therefrom that support the finding. Id.

### **Issue One: Trust Interest**

Husband first contends that the dissolution court “included no value for the trust in the recapitulation of the assets going to the wife” and that the dissolution court “was incorrect when it found that no evidence beyond a loose estimate was presented on the value of the trust.” Brief of Appellant at 6. In support of that contention, Husband directs us to evidence that the trust corpus is currently worth “around \$500,000.” Id. at 7. But Wife's right to the corpus is contingent on Husband predeceasing her and Wife's submitting a written request to terminate the trust. See Loeb v. Loeb, 261 Ind. 193, 301 N.E.2d 349, 353 (1973) (discussing distinction between vested interest subject to

complete defeasance and contingent interest in trust). Because Wife does not have a present vested interest in the trust corpus, the corpus is not a marital asset. See, e.g., In re Marriage of Dall, 681 N.E.2d 718, 722 (Ind. Ct. App. 1997) (holding because parties did not have present vested interest in marital residence, dissolution court should not have included market value of residence in marital estate). To the extent that Husband argues that the trust corpus should have been included in the marital estate, that argument must fail.

Next, to the extent that Husband contends that the dissolution court did not include Wife's interest in the trust in the marital estate, that contention is without merit. Conclusion Number 7 states, albeit incorrectly, that the "trust corpus" is included in the marital assets.<sup>1</sup> Appellant's App. at 19. In Conclusion Number 10, the dissolution court correctly states that Wife's portion of the marital estate includes "Wife's interest in the Anna Louise Hall Trust (undetermined present value)." Id. at 20. Thus, contrary to Husband's assertion, the dissolution court did include Wife's interest in the trust as a marital asset and set it over to her.

As for Husband's contention that the dissolution court improperly assigned no value to Wife's interest in the trust, again, Husband does not direct us to any evidence showing the present value of that interest. Indeed, it does not appear that Husband presented any evidence of the present value of Wife's interest in the trust. Accordingly, Husband is estopped from alleging error on this issue. See Perkins v. Harding, 836 N.E.2d 295, 301 (Ind. Ct. App. 2005) (holding party who fails to introduce evidence of

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<sup>1</sup> The findings and conclusions, read as a whole, indicate that the dissolution court awarded Wife's interest in the trust to Wife, and not the trust corpus.

value of asset is estopped from alleging error in lack of assigned value on appeal). And, again, because Wife has only a contingent interest in the trust corpus, the evidence of the value of the corpus is irrelevant to this issue. Regardless, in Finding Number 38, the dissolution court included in Wife's income \$387.58 in gross weekly income from her interest in the trust.

Husband also contends that the dissolution court "gave improper weight to the intent of the wife's family" in awarding Wife 100% of her interest in the trust. Brief of Appellant at 10. In support of that contention, Husband cites to van Oosting v. van Oosting, 521 N.W.2d 93 (N.D. 1994), but that case is inapposite. By statute, the dissolution court is expressly authorized to consider whether a marital asset was acquired through inheritance in dividing the estate. Here, the dissolution court included detailed explanations behind its decisions to award Wife the assets she obtained through inheritance. Moreover, in his proposed findings and conclusions, Husband did not seek any part of the trust interest to be set over to him. Husband has not demonstrated an abuse of discretion.

### **Issue Two: Unequal Division of Marital Pot**

Next, Husband contends that the dissolution court abused its discretion when it divided the marital pot unequally, awarding Wife approximately 70% of the marital pot.<sup>2</sup> When ordering an unequal division of marital assets, the dissolution court must consider all of the factors set out in Indiana Code Section 31-15-7-5. See Eye v. Eye, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006). That statute provides:

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<sup>2</sup> Without evidence of the value of Wife's current interest in her mother's trust, we cannot state with certainty what percentage of the marital pot Wife received.

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

(1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.

(2) The extent to which the property was acquired by each spouse:

(A) before the marriage; or

(B) through inheritance or gift.

(3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to:

(A) a final division of property; and

(B) a final determination of the property rights of the parties.

We begin with the strong presumption that the dissolution court considered and complied with the applicable statute, which must be overcome by a party challenging the dissolution court's division of marital property. Eye, 849 N.E.2d at 701.

Here, Husband first contends that the dissolution court "improperly gave controlling effect to the fact that the wife had inherited the assets awarded to her." Appellant's Brief at 13. Husband maintains that, had the dissolution court properly considered each of the statutory factors, the court would have awarded him more of the

marital assets. While Husband agrees that an unequal distribution of marital assets is appropriate, he argues that he should get a greater share of the assets than awarded. In particular, Husband contends that, including the trust corpus value of \$500,000, the total marital estate is actually \$1,714,006. And while he would agree to awarding Wife the entire \$500,000 trust corpus, he maintains that he is entitled to the total value of the marital residence and the Blue Grass farm assets. In sum, Husband asserts that he is entitled to \$517,547.94, and Wife is entitled to approximately \$1,200,000. That is the equivalent of approximately a 70-30 split in favor of Wife.

Because the dissolution court awarded Wife approximately 70% of the marital estate in its decree, the only real dispute on appeal is whether the dissolution court should have valued Wife's interest in the trust at \$500,000, as Husband contends. But, as we have already discussed, Wife does not have a present, vested interest in the trust corpus, and neither party presented evidence of the value of Wife's actual present interest in the trust. Thus, we disagree with Husband's valuation of the marital estate. And given that Husband proposes an approximate 70-30 split in favor of Wife, and the dissolution court awarded an approximate 70-30 split, there is no abuse of discretion.

Still, Husband maintains that, in considering the statutory factors supporting an unequal division of assets, the dissolution court improperly found that Husband has substantially more earning potential than Wife. In particular, Husband asserts that there is no apparent reason why Wife cannot work more hours per week and that she is capable of working year-round. But Husband testified that his earning potential could be "pretty substantial" because of his CDL. Transcript at 157. And the dissolution court

did not find credible Husband's testimony that he quit his job at Switzer for health reasons. The undisputed evidence shows that Wife has only a high school education, with one semester at college, and that she otherwise worked in the home and on the farm. Wife testified that she had some difficulty finding a job after the parties' separation, so she was happy to accept the job at the school. And Wife explained that her work schedule allows her more time to be a mother to H.H. Husband's contention on this issue amounts to a request that we reweigh the evidence, which we will not do.

Next, Husband disputes the dissolution court's conclusion that he was compensated for his work on Dennis Farm by sharing in the income from that operation over the years. Husband maintains that his work "would have, at least, maintained the value of Dennis Farm owned by the wife's parent. It also generated income for the wife's parent. This would have freed up funds of the parent of the wife to be placed in the trust fund created for the wife." Brief of Appellant at 16. But in response, Wife directs us to evidence that her father provided money and equipment for running the farm over the years, including cosigning on a \$200,000 loan that was ultimately settled and paid out of Wife's father's estate. And Wife testified that the parties were on the brink of bankruptcy and needed her father's financial assistance to keep the farm going. The evidence also shows that Husband and Wife shared profits from Dennis Farm with Wife's father. Again, Husband asks that we reweigh the evidence, which we will not do.

Finally, Husband maintains that the dissolution court should have awarded him more of the parties' assets in light of the duration of their marriage. But that is not a statutory factor, and we are not persuaded by Husband's argument on this issue. The

dissolution court entered extensive findings and conclusions to support its division of assets, and Husband has not demonstrated an abuse of discretion. See, e.g., Shumaker v. Shumaker, 559 N.E.2d 315, 318 (Ind. Ct. App. 1990) (holding dissolution court did not abuse its discretion in awarding husband 85% of marital estate where husband acquired one property prior to parties' marriage and acquired two properties through inheritance).

### **Issue Three: Husband's Employment**

Finally, Husband contends that the dissolution court abused its discretion when it found that he is voluntarily underemployed. But, again, the dissolution court expressly found that Husband's testimony that he quit his job at Switzer for health reasons was not credible. And the evidence shows that he had substantial earning potential in light of his CDL. Husband again asks that we reweigh the evidence, which we will not do. The dissolution court did not abuse its discretion when it concluded that Husband is voluntarily underemployed.

Affirmed.

ROBB, J., and MAY, J., concur.